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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-82

MILTON LUROS, REUBEN STURMAN, LONDON PRESS, INC., and WORLD WIDE NEWS, INC.,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Respectfully submitted,

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vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Reuben Sturman and World Wide News, Inc., petitioners herein, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California.

Opinions Below

The petitioners' motion to dismiss the indictment was granted by the trial court. The trial court's oral ruling is unreported but is printed as Appendix A at page 10.

The judgment of the trial court was upheld in the California District Court of Appeal for the Second Appellate District in an unreported opinion which appears in Appendix B at page 19.

The opinion of the Supreme Court of the State of California is reported in 4 Cal. 2d 84, 480 P. 2d 633, 92 Cal. Rptr. 833, and is printed in Appendix C at page 22.

Jurisdiction

The judgment of the Supreme Court of the State of California was entered on February 18, 1971. Mr. Justice Harlan granted an extension to July 15, 1971, for the filing of this petition. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

Question Presented

1. Whether a Grand Jury's finding of probable cause that several books are obscene without any evidence bearing on the issue of obscenity, abridges the exercise of the petitioners' rights under the First and Fourteenth Amendments to the United States Constitution.

Constitutional and Statutory Provisions Involved

1. The Constitution of the United States, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The Constitution of the United States, Amendment XIV:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

3. California Penal Code, § 939.8:

> "The grand jury shall find an indictment when all the evidence before it, taken together, if unexplained and uncontradicted, would, in its judgment, warrant conviction by a trial jury."

Statement of the Case.

An amended indictment was returned in the Supreme Court of the State of California for the County of Los Angeles on July 30th, 1966, charging the petitioners Reuben Sturman and World Wide News, Inc., an Ohio corporation, with violating § 182(1) of the California Penal Code by conspiring with certain other individuals to violate § 311.2 of the California Penal Code (the California obscenity statute).

The indictment charged the petitioners with unlawfully conspiring to violate the California obscenity statute by publishing, printing and distributing four allegedly obscene books titled *Seed of the Beast, Queer Daddy, The Experimenters,* and *Just for Kicks* [R. 334-337, 339].* An examination of these books reveals that each of them is concluded with righteousness prevailing. All the stories are uniform in that the central character, who becomes morally delinquent, discovers his error and ultimately reforms. All four of the novels possess a plot, a theme, a happy conclusion and also possess some literary merit. They uniformly omit any and all terms descriptive of the genital areas of the anatomy and avoid any four-letter words commonly found in some of our best sellers. They avoid any *explicit* descriptions or representations of normal or abnormal sex acts. Throughout all four of the novels there are numerous descriptions of sexual encounters between the various characters, but these descriptions are handled tastefully and neither in language nor in theme do the books contain the candor of discussion or explicitness of language that is found paramount in some of the

* Refers to the Clerk's transcript on appeal in the District Court of Appeal for the Second Appellate District, State of California, and which was also before the Supreme Court of the State of California.

writings and best sellers generally accepted and widely read by the American public.

Raising the Federal Question

In ruling upon the petitioners' motion to dismiss the indictment pursuant to California Penal Code, § 995, the trial court held that the indictment against these petitioners had been returned without probable cause since the prosecutor had simply introduced into evidence before the grand jury the four books specified in the indictment.

Except for a copy of the book entitled *Sex Life of a A Cop,* which this Court found to be not obscene in *Aday v. United States,* 388 U. S. 447, the prosecutor presented no evidence to the grand jury to establish that the challenged books exceeded contemporary community standards, appealed to anyone's prurient interest, or were utterly without redeeming social value.

The trial court's judgment was upheld by the Court of Appeals of the State of California for the Second Appellate District on December 23, 1968 (Appendix B at page 19).

Subsequently, the People of the State of California secured a petition for hearing before the California Supreme Court on February 19, 1969. The People reargued that the indictment was properly secured under the California Penal Code, § 939.8, and the decision of the California Supreme Court in *Aday v. Superior Court,* 55 Cal. 2d 789, 632 P. 2d 47, 13 Cal. Rptr. 415 (1961), and the ruling of a lower court in *People v. Aday,* 226 Cal. App. 2d 520, 38 Cal. Rptr. 199 (1964).

The petitioners re-argued that the return of this indictment under the circumstances of this case was violative of

their rights under the First and Fourteenth Amendments to the United States Constitution.

On February 18, 1971, the California Supreme Court, dramatically divided 4-3, reversed the Court of Appeals and re-instated the indictment.

Reasons for Granting the Writ

The judgment below involves a highly significant ruling regarding a grand jury's investigation of First Amendment materials which is in direct defiance of this Court's decisions regarding free speech.

Stated simply, that ruling holds that a grand jury may indict certain publishers of allegedly obscene books without receiving any evidence on the question of obscenity except the books themselves.

At the time this indictment was returned, the California Penal Code § 939.8 provided that "The grand jury shall find an indictment when all the evidence before it, taken together, if unexplained and uncontradicted, would, in its judgment, warrant conviction by a trial jury."

Since the Supreme Court of the State of California has interpreted this statute in the decision below as allowing the return of an indictment in an obscenity case without any evidence bearing on the issue of obscenity except the books themselves, it violates the provisions of the First and Fourteenth Amendments as construed by this Court.

A bare majority of the California Supreme Court has held that a grand jury is only concerned with whether there was probable cause to believe the material obscene, and compared that standard of probable cause to the standard ". . . applied to determine the *legality of a*

search warrant, or of an arrest without a warrant, or of a felony accusation" (Appendix C, *infra*, p. 22, fn. 5).

The due process clause of the Fourteenth Amendment dictates that under the most basic criminal disciplines there must be some evidence before the grand jury to establish "probable cause" to believe the material is obscene. See *Costello v. United States*, 350 U. S. 359 (1956), Mr. Justice Burton, concurring at page 364. Surely even the most minimal standards of grand jury due process established in *Costello* were not met in this case, which involves First Amendment material, where even higher standards of proof are required. Even in the most simple bookmaking case or narcotics prosecution the State must confront the grand jury with some evidence, expert or otherwise, to show that the slips of paper seized or chemical substance confiscated is the contraband proscribed by the statute. Simply offering the bookmaking slips or the heroin in evidence is never enough to satisfy the due process demands of the Fourteenth Amendment.

This Court has consistently held that there can be no restraint upon the distribution of any form of expression unless there has been a "searching inquiry" into the issue of obscenity. *Marcus v. Search Warrants*, 367 U. S. 717 (1961); *Quantity of Books v. Kansas*, 378 U. S. 205 (1964); *Lee Art Theatre, Inc. v. Virginia*, 392 U. S. 636 (1968). Certainly the mere reading of the books by untrained grand jurors, without any judicial supervision, does not constitute such a "searching inquiry."

It makes no difference whether the restraint imposed is caused by the state's seizure of such publications (*Quantity of Books v. Kansas, supra*) or by the confiscation of a motion picture film (*Lee Art Theatre, Inc. v. Virginia*,

supra), or by arresting a person for the sale of a particular book (*Delta Books Distributors, Inc. v. Cronvich*, 304 F. Supp. 662 [1969]), or by threatening that certain sanctions may be imposed if certain books are distributed (*Bantam Books, Inc. v. Sullivan*, 372 U. S. 58 [1963]), or by placing police officers in a bookstore to surveil the sale of books (*Bee See Books, Inc. v. Leary*, 291 F. Supp. 622 [S. D. N. Y., 1968]).

These cases teach us that once it is foreseeable that certain governmental action will restrain the free circulation of reading material, a "searching inquiry" into the issue of obscenity is constitutionally required.

Surely the return of a felony indictment against the publisher or distributor of books imposes just as serious a restraint on the distribution of those materials as the warnings found to be constitutionally impermissible in the *Bantam Books* case. Experience has taught us that every time a book is charged as obscene, others are reluctant to sell that same book because of their fear of suffering similar criminal sanctions.

This Court has previously acknowledged that criminal prosecutions in the First Amendment area often involve imponderables ". . . that themselves may inhibit the full exercise of First Amendment freedoms . . . ." *Dombrowski v. Pfister*, 380 U. S. 479 (1965). Furthermore, as the Court pointed out in that case:

> "The asumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded . . . [f]or 'the threat of sanctions may deter . . . almost as potentially as the actual application of sanctions.'
>
> * * *

> The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospect of its success or failure." 380 U. S. at 486, 487.

Nothing could be more chilling on the exercise of a publisher's First Amendment rights than to return a felony indictment against him, as was done in the case at bar.

A number of respectable appellate courts have held that one may not be convicted under an obscenity statute without proof that the materials appeal to a person's prurient interest, are patently offensive, or are utterly without redeeming social value. *United States v. Klaw*, 350 F. 2d 155 (2d Cir., 1965); *Luros v. United States*, 389 F. 2d 200 (8th Cir., 1968); *In re Giannini and Iser*, 72 Cal. Rep. 665, 446 P. 2d 535 (1968); *Hudson v. United States*, 234 F. 2d 903 (D. C. Cir. A., 1967); and *Dunn v. Maryland State Board of Censors*, 24 Md. 249, 213 A. 2d 751 (1965). See also this Court's decision in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U. S. 413 (1966) and *Redrup v. New York*, 386 U. S. 767 (1967). Since the California prosecutor failed in this case to present any evidence to the Grand Jury bearing on the critical elements of obscenity, the petitioners' indictment was a denial of due process under the Fourteenth Amendment. *Thompson v. City of Louisville*, 362 U. S. 199 (1960) and *Garner v. Louisiana*, 368 U. S. 157 (1961).

Consequently, California prosecutors must be reminded that the constitutional standards and protections announced by this Court in *Quantity of Books v. Kansas*, *supra*, and *Dombrowski v. Pfister*, *supra*, are applicable to cases presented to Grand Juries and have not been relaxed or repealed. The decision below, in short, will undoubtedly be taken by State prosecutors as a signal that this Court's

prior decisions respecting First Amendment protections no longer need be respected or followed. Such a decision is bound to invite widespread abuses, which under the First Amendment simply cannot be tolerated. Since the determination by the California Supreme Court reflects so egregious a disrespect for this Court's rulings, a review and correction of that determination is required.

For all of these reasons this petition for a writ of certiorari to review the judgment of the Supreme Court of the State of California should be granted.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

Pertinent Excerpts From Oral Opinion of Trial Court Dismissing Indictment.

Superior Court of the State of California, for the County of Los Angeles.

Department No. 43.

Hon. Bernard S. Selber, Judge.

The People of the State of California, Plaintiff, vs. Milton Luros, Reubin Sturman, London Press, Inc., and World Wide News, Defendants. No. 324782.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Wednesday, August 23, 1967

APPEARANCES OF COUNSEL:

For the People: Evelle J. Younger, District Attorney, By: William E. McGinley, Deputy, 600 Hall of Justice, Los Angeles 12, California.

For the Defendants, Luros & London Press: Stanley Fleishman; Suite 700, Taft Building, 1680 Vine Street, Hollywood, California.

For the Defendants, Sturman and World Wide News: H. P. Fahringer; One Niagara Square, Buffalo, New York 14202. Lelise L. Richter, C.S.R., Official Reporter, County Courthouse, 111 North Hill Street, Los Angeles 12, California.

Los Angeles, California, Wednesday, August 23, 1967 9:30 A.M.

THE COURT: Gentlemen, this is the case, again, of People versus Luros, Sturman, and the corporations. The defendants are present, as are counsel.

This morning the Court was proposing to proceed relative to the motion under 995 and its ruling thereon.

Is there anything further before the Court proceeds to rule on the motion under 995 that desires to be said by any of the counsel?

MR. McGINLEY: Nothing further.

MR. FLEISHMAN: Nothing further.

MR. FAHRINGER: Nothing further.

THE COURT: Then I jotted this down last night, this portion, and some portion this morning. It is in the nature of an informal decision re the ruling on the motion under 995 and because it is in my own handwriting and particularly because of that it may be rather difficult for me to read. I think, however, that the decision and its bases will be clear to all of you. I think also, Mr. Reporter, after we have given it to you you should call in one of our court secretaries and perhaps read it off to her and have her prepare it in a memorandum form so it can be placed into the file for such value as it may have in the future proceedings.

This decision is in the nature of an informal decision re the ruling on the motion under 995:

1. It is within the discretion of a court to permit a defendant to withdraw a prior plea for the purpose of moving under Penal Code Section 995 to set aside a grand jury indictment. *Hall vs. Superior Court,* 1953, 120 C.A. 2nd, 844.

2 There are perhaps special rules that are applicable to the exercise of this discretion when the defendant has previously made a motion under 995, the ruling thereon being adverse to him. *People vs. Scofield,* 249 A.C.A. 836.

a. There must have been a substantial change in circumstances, such as new law favorable to the pe-

titioner being made by recent decisions, to warrant the Court's entertaining such a motion for the second time, or

b. In this reconsideration the Court is bound by the prior decision as to those issues ruled upon therein, which decisions have not been adversely affected by changes in the law and in subsequent cases.

3. The adverse ruling on the first 995 motion was made on November 7, 1966 in Department 101 of this court. Since that date the following pertinent cases have been decided, among others:

a. In *Aday vs. The United States,* October term, 1966, No. 149, the U. S. Supreme Court reversed the conviction of one Aday based on the book, "Sex Life of a Cop," and ruled that book to be nonobscene and, hence, constitutionally protected.

b. *Redrup vs. New York, Austin vs. Kentucky* and *Gent vs. Arkansas,* 87 Supreme Court 1414 is a holding to the effect that paperback books, "Lust Pool" and "Shame Agent" are not obscene.

c. A series of per curiam decisions handed down by the United States Supreme Court on June 12, 1967, all based on the aforementioned Redrup, Austin and Gent cases, and all reversing lower court convictions and all holding that the subject paperback books involved are nonobscene and, hence, constitutionally protected. Included in those decisions on that important day were: *Books, Inc. vs. United States,* 87 Supreme Court 2908; *Quantity of Copies of Books vs. Kansas,* 87 Supreme Court 2104; *Corinth Publications, Inc. vs. Wesberry,* 87 Supreme Court 2096; *Keney vs. New York,* 87 Supreme Court, 2991; *Mazes vs. Ohio,* 87 Supreme Court, 2105; *Friedman vs. New York,* 87 Su-

preme Court, 2991; *Sheperd vs. New York,* 87 Supreme Court, 2093; *Avansino vs. New York,* 87 Supreme Court, 2093; *Rosenbloom vs. Virginia,* 87 Supreme Court, 2095; *Ratner vs. California,* 87 Supreme Court, 2090; *Cobert vs. New York,* 87 Supreme Court, 2092 and *Schackman vs. California,* 87 Supreme Court, 2107.

d. Further decisions are a United States Court of Appeals, Ninth Circuit decision in the case of *Grant and Wissman vs. United States,* decided June 28, 1967, bearing U. S. Criminal Number 17865, holding certain paperback books as junk but not obscene.

e. Also pertinent is a holding of our state Supreme Court of considerable value in considering the necessary elements of conspiracy to commit a misdemeanor. *People vs. Lauria,* 251 A.C.A. 532.

f. Also of importance is a decision of the Appellate Department of this Superior Court in reversing a conviction of the trial court based upon a faulty instruction advising the jury that the book, "Sex Life of a Cop" was obscene. *People vs. Escobar,* Appellate Department of the Superior Court, Criminal Appeals Number 7235, decided August 8, 1967.

g. Finally, the granting of a hearing by our State Supreme Court in *People vs. Noroff,* Court of Appeals, Second Appellate District, Division Two, 2nd Criminal No. 13056, which case had held that the trial court could not be compelled, by motion, to make an independent determination of constitutional obscenity where the People, in good faith, proposed to present evidence of pandering, as per *Ginzburg vs. United States,* 383 U. S. 463.

4. It is undisputed in this case that the Grand Jury, in addition to all other evidence was given only

one book for comparison of contemporary community standards. They were, in effect, advised that they should compare the subject books with "Sex Life of a Cop," which they were properly told was obscene at the time but which has since been declared constitutionally protected. Thus, it may be said the Grand Jury had, one: an improper standard for comparison of the instant books, which in all probability affected their decision, and, two: not one valid comparative contemporary community standard by which to evaluate the books.

5. A Grand Jury indictment may not be set aside so long as there is competent evidence upon which it may be founded. The mere receipt by a Grand Jury of incompetent evidence will not suffice to set aside its indictment, so long as sufficient competent evidence still remains. *People vs. Nathanson*, 134 C. A. 2d 43, *People vs. Olf*, 195 C. A. 2d 97.

6. While the People argue that the books themselves are sufficient evidence upon which the Grand Jury could bring an indictment, this Court is of the opinion that where the People themselves have introduced evidence for the purpose of comparison, which evidence was nonobscene, that being the sole basis for comparison, that the conclusion is inescapable that the Grand Jury followed such a suggestion and, in effect, compared the work to a protected book. That in an obscenity proceeding, particularly the matter of contemporary community standards, is exceedingly important, involving, as it does, the very definition of obscenity given in *Roth vs. United States*, 354 U. S. 476 and as modified in the subsequent U. S. Supreme Court decisions in *Manuel vs. Day*, 360 U.S. 478, *Mishkin vs. State of New York*, 383 U. S. 502, *Jacobel-*

lis vs. Ohio, 378 U. S. 184, *Ginzburg vs. United States*, 383 U. S. 463 and others.

In this case the Court finds that the probability of an improper application of evidence of contemporary community standards is so strong as to require the Grand Jury once again to consider the evidence, this time with proper guides, or surely not with improper ones.

7. In addition, this Court sets aside the indictment for the reason that the People failed to meet its affirmative burden to present some evidence of contemporary community standards. This Court is well aware that in *People vs. Aday*, 226 C. A. 2d 500, the Court stated that a Grand Jury need not have such evidence in order to determine probable cause for issuance of an indictment. However, in the years since *People vs. Aday*, several cases have held that the People must affirmatively present such evidence in the trial court. *United States vs. Klaw*, 350 F. 2d. 155, *United States vs. Nardone*, Criminal Action Nos. US 5156-65; US 10624-25-65; US 7205-07-65; US 711-12-66; US 1790-66; US 2185-66; US 1099-66; US 1100-66 and *Jacobellis vs. Ohio*, 378 U. S. 184, decided in 1964.

This Court is of the opinion that the rule of these cases applies with equal force to a Grand Jury considering the issue of obscenity; if no such evidence is presented, the jurors are then violating a cardinal principle, of receiving evidence "out of court," this being their own personal beliefs and understandings as to what such standards are.

While it might be successfully contended, in some cases which involve the rankest, most patent type of hard core pornography, that a standard may not be

necessary, the material herein involved does not reach that description.

8. The error in presenting the erroneous standard is made even more serious, in the opinion of this Court, in that this Court feels that an alternative theory upon which the Grand Jury might conceivably have brought in its indictment, cannot stand. Pursuant to the doctrine of Ginzburg, a Grand Jury might well consider that in a close case as to obscenity, evidence of pandering as described in Ginzburg might well elevate material, otherwise intrinsically not obscene, to the obscene category.

This Court is of the opinion that the evidence of pandering presented to this Grand Jury is generally in the nature of "jackets and blurbs," or brochures containing the same, and that such evidence has been specifically held insufficient as to *retailers* in the Redrup case, and other June 12, 1967 holdings, and at least impliedly so in *Aday vs. United States* wherein a publisher was involved, along with a book containing "jacket and blurb," "Sex Life of a Cop."

9. In the course of the months that this Court has had jurisdiction of this case, the Court has invited the presentation of authorities from both sides, including comparable standards, in preparation for ruling upon the constitutional obscenity or nonobscenity of the four books involved in this proceeding.

People vs. Noroff, supra, precluded the court from making such an independent ruling, where the People proposed to present evidence of pandering. However, the Supreme Court of this State has accepted People vs. Noroff for hearing and as of now *People vs. Zeitlin*, 50 Cal. 2d 901 is once again the law. This case

makes it the duty of the trial court, when requested, to make such a ruling. In view of this Court's decision to set aside the Grand Jury indictment, however, and the further proceedings of People vs. Noroff before the State Supreme Court, and the further fact that all evidence on this motion was not fully presented by either side, to the Court, this Court declines at this time to assign, as an express basis for setting aside the indictment, that the books are constitutionally protected.

A further reason for declining to rule on constitutional obscenity is that, at best, such a ruling would be dictum herein and might be deemed to have a prejudicial effect upon any future court or grand jury having to pass on identical or related matters.

10. In view of the Court's express findings made previously in this decision, it is not necessary to make any findings on the sufficiency of the evidence relative to the issues of conspiracy. In any event, the Scofield case might well preclude such a ruling by this Court.

However, to complete the record, this Court wishes purely and informally, to state its opinion that the present record of involvement in the alleged conspiracy of these individuals leaves much to be desired. Further, even if evidence of pandering by the defendant, World Wide News, Inc., is held sufficient as to the publisher, it is a most serious question if it can be urged to apply against the defendant Luros and London Press.

11. Finally, from all that the Court has said, both by way of formal finding and informal advices, it is clear that another fresh look at the evidence, as of this time, which is now available to the People, should be had by the Grand Jury before a trial of an estimated

one and one-half months' duration, with all of the ramifications this entails, should be conducted.

* * * *

Basically, then, the ruling is that the motion under 995 is granted; the case will be sent back to the Grand Jury for further consideration of the evidence should the People decide to present it, or for that matter, if there should be an appeal based upon the Court's ruling. Certainly I have made the decision broad enough to encompass, one, the area of the improper standards; two, the fact of no standards and, three, I suppose there is sufficiently included within this decision for the purposes of appeal, the opinion of the Court that the evidence presented is insufficient—at least that evidence presented to the Grand Jury; whether there is more available or not, I do not know—insufficient to constitute the kind of pandering set forth in the Ginzburg case, so certainly on those three grounds, if not others in this decision, there might be the availability of securing an appellate department's and perhaps a higher court's view on those matters that could be helpful in the field.

* * * *

APPENDIX B.

Opinion of the Court of Appeal, Second Appellate District.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

The People, Plaintiff and Appellant, vs. Milton Luros, Reubin Sturman, World Wide News and London Press, Inc., Defendants and Respondents. Crim. No. 14253.

Filed: Dec. 23, 1968.

APPEAL from an order of the Superior Court of Los Angeles County setting aside an indictment. Bernard S. Selber, Judge. Affirmed.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, Evelle J. Younger, District Attorney, County of Los Angeles, Harry Wood, Chief, Appellate Division, Robert J. Lord and William E. McGinley, Deputy District Attorneys, for Plaintiff and Appellant.

Stanley Fleishman, for Defendants and Respondents Luros and London Press, Inc.; H. P. Fahringer and Gerald J. Levie, for Defendants and Respondents Sturman and World Wide News.

The People appeal from an order made pursuant to section 995 of the Penal Code setting aside an indictment. It charged defendants with conspiracy to violate section 311.2 of the Penal Code, by printing, publishing and distributing four allegedly obscene books.[1]

The four books in question were presented to the grand jury together with a fifth book—"Sex Life of a

[1]The four books are: "Seed of the Beast," "Queer Daddy," "The Experimenters" and "Just for Kicks."

Cop." After the introduction of evidence that "Sex Life of a Cop" had been held to be obscene by the California courts, the grand jury was asked to make its determination on the issue of whether there was probable cause to believe that the four books were obscene, by comparing them to "Sex Life of a Cop." No other standard or basis was given upon which to judge the alleged obscenity of the books.

Subsequent to the grand jury proceedings and the return of the indictment against defendants, the United States Supreme Court rendered its decision in *Aday v. United States* (1967) 388 U.S. 447 [18 L ed.2d 1309.]. The Court ruled that "Sex Life of a Cop" is not obscene.

Thereafter (on August 23, 1967), defendants made their motion under section 995. In granting it, the superior court concluded that, since there was no proper evidence of contemporary community standards upon which to base a judgment on the issue of the alleged obscenity of defendants' four books, the indictment returned was void as not founded upon reasonable or probable cause.

The ruling of the court below was correct.

"Although the duty of determining whether or not an indictment should be returned is lodged exclusively in the grand jury and not in the courts (Pen. Code, § 939.8; *Lorenson v. Superior Court* (1950), 35 Cal. 2d 49, 55 [216 P.2d 859], an 'indictment . . . must be set aside by the court . . . [when] the defendant has been indicted without reasonable or probable cause.' (Pen. Code, § 995.)" (*Callan v. Superior Court,* 204 Cal.App.2d 652, 661.) And, such is the case where there is a total absence of evidence supporting a neces-

sary element of the crime charged. (*Callan v. Superior Court, supra,* at p. 662; *People v. Bartlett,* 199 Cal.App.2d 173, 179.).

In the recent California Supreme Court decision, *In re Giannini and Isler,* the Court held that, in order to establish a violation of Penal Code, section 311, ". . . the prosecution must introduce evidence that, applying contemporary community standards, the questioned [conduct] . . . appealed to the prurient interest . . . and affronted the standards of decency accepted in the community." (69 A.C. 588, 592.)

The Court, in the above decision, concluded (at p. 599): "Relying principally on the well established doctrine that jurors should not be endowed with the prerogative of imposing their own personal standards as the test of criminality of conduct, we hold that expert testimony should be introduced to establish community standards."

Here the finding of probable cause to believe that defendants' books were obscene is not supported by the evidence since there was a complete failure by the People to introduce any competent evidence of contemporary community standards.

The order is affirmed.

Jefferson, *J.*

We concur:

Files, *P. J.*

Dunn, *J.*

Certified for nonpublication in the Official Reports pursuant to rule 976.

Files, *P. J.*

Jefferson, *J.*

Dunn, *J.*

APPENDIX C.

Opinion and Judgment of the Supreme Court of the State of California.

In the Supreme Court of the State of California, in Bank.

The People, Plaintiff and Appellant, v. Milton Luros et al., Defendants and Respondents. Crim. 13153.

Filed: Feb. 18, 1971. G. E. Bishel, Clerk.

Defendants, Milton Luros, Reuben Sturman, World Wide News and London Press, Inc., were indicted in June 1966 by the Grand Jury of Los Angeles County for conspiring to violate section 311.2 of the Penal Code[1] by wilfully preparing, publishing, printing and distributing four obscene books.[2] Defendants moved, pursuant to section 995, to have the indictment set aside. The trial court first denied the motion, but, after reconsideration, reversed its decision and set aside the indictment on the ground that the prosecution had failed to introduce any competent evidence of contemporary community standards by which the grand jury might be guided in determining whether there was probable cause to believe that defendants' books were obscene. The People appeal from the order setting aside the indictment.

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[1]Hereafter, unless otherwise indicated, all section references are to the Penal Code.

[2]At the time of the offense section 311.2 provided: "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into the state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor." The recent amendment of the section is not relevant to the instant proceedings.

At the grand jury proceedings in June 1966 the prosecutor introduced copies of the four allegedly obscene books, "Seed of the Beast," "Queer Daddy," "The Experimenters," and "Just for Kicks." He also introduced a fifth book, "Sex Life of a Cop," concerning which there had been established in other proceedings probable cause for the belief that it was obscene.[3] The grand jury read and presumably compared the four allegedly obscene books with "Sex Life of a Cop" to determine whether or not there was probable cause to believe the four books obscene. In introducing "Sex Life of a Cop," the prosecution relied on our holding in Aday v. Superior Court (1961) 55 Cal.2d 789, 798, that there was probable cause to believe such book obscene. The lower federal courts held the book to be in fact obscene. (United States v. West Coast News Company (6th Cir. 1966) 357 F.2d 855, 857, 858.) However, after the instant indictment was filed but before the trial court ruled on defendants' motion to set aside the indictment, the United States Supreme Court held that "Sex Life of a Cop" was not obscene. (Aday v. United States (1967) 388 U.S. 447.)

No evidence of contemporary community standards other than "Sex Life of a Cop" was introduced before the grand jury. After reading all five books, and considering evidence of defendants' involvement in the publication and distribution of the four books charged as obscene, the grand jury returned the instant indictment. In setting the indictment aside, the trial court recognized that its ruling was in conflict with the holdings in Aday v. Superior Court, *supra*, 55 Cal.2d 789, 798 and People v. Aday (1964) 226 Cal.App.2d

[3]We explain the introduction of this evidence, *infra*.

520, 531-532, but was of the view that those cases had been overruled by more recent decisions. We conclude that those cases were correctly decided and have continued and undiminished vitality.

In Aday v. Superior Court, *supra,* 55 Cal.2d 789 we reviewed the validity of a search warrant which authorized seizure of two named books alleged to be obscene, as well as a wide variety of other books, records and objects. Although we there determined that the warrant was in certain respects unconstitutionally broad, we concluded that it was not invalid as a whole and we upheld that part of it which authorized the seizure of the named books constituting the principal basis of the charge of obscenity. (*Id.* at pp. 796-798.) The magistrate had read portions of the two named books before issuing the warrant, but had not received evidence as to contemporary community standards. We examined the books and held that there was probable cause to believe them obscene. After referring to the rule for determining obscene material announced in the *Roth* case (Roth v. United States (1957) 354 U.S. 476), we said: "It should be emphasized that in applying these principles here we are concerned only with probable cause, not with the final determination as to the character of the named books or the guilt of petitioners. An examination of the two books convinces us there was probable cause for believing that they are obscene. Their text is such that an average person, applying contemporary community standards, could reasonably believe that their dominant theme appeals to a lascivious, shameful, and morbid interest in sex and that they are totally lacking in redeeming value, literary or otherwise. In view of their contents it was not necessary for [the magistrate] to . . . receive evidence

as to contemporary community standards in order to determine the issue of probable cause." (Aday v. Superior Court, *supra,* 55 Cal.2d at p. 798.)

We went on to say: "Where, as here, the seizure occurs under a warrant, an ex parte determination of the issue of obscenity, so far as probable cause is concerned, has taken place before issuance of the warrant, and immediately after the seizure a determination of the issue to that extent can be obtained in adversary proceedings by controverting the warrant under sections 1539 and 1540 of the Penal Code. In the event the owner in unsuccessful in that proceeding, a final determination as to obscenity will be had in the criminal action which will ordinarily follow within a reasonable time, or other remedies such as mandamus will be available to secure return of the property." (Aday v. Superior Court, *supra,* 55 Cal.2d at p. 799.)

Our holding in Aday v. Superior Court, *supra,* was followed three years later by the Court of Appeal in People v. Aday, *supra,* 226 Cal.App.2d 520. In that case, as in the case at bench, the defendant challenged an indictment because no evidence of contemporary community standards had been submitted to the grand jury.[4] The court there carefully set out both the standards and the procedures governing grand jury deter-

[4]In People v. Aday, *supra,* 226 Cal.App.2d 520, the defendants were charged by indictment with a violation of section 182, subdivision 1, namely, a conspiracy to violate section 311, subdivision 3, which then provided in pertinent part: "Every person who wilfully and lewdly. . . . 3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book . . . is guilty of a misdemeanor." (*Id.* at p. 525.) As previously pointed out (see text at fn. 2, *ante*) defendants in the instant case were charged by amended indictment with a violation of section 182, subdivision 1, namely, a conspiracy to violate section 311.2.

mination on the issue of whether there exists probable cause to believe material obscene: " 'The standard for judging obscenity adequate to withstand the charge of constitutional infirmity is whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.' (In re Harris, 56 Cal.2d 879, 880 [16 Cal.Rptr. 889, 366 P.2d 305]; Roth v. United States *supra*, 354 U.S. 476, at p. 489 [77 S.Ct. 1304, 1 L.Ed.2d 1498, 1509]; Aday v. Superior Court, *supra*, at p. 798.) Accordingly, it is a denial of due process for a trial court not to allow a defendant to prove contemporary community standards at his trial. (In re Harris, *supra*, at p. 880.) It is not necessary, however, that evidence of contemporary community standards be received on the issue of probable cause. (See Aday v. Superior Court, *supra*, at pp. 798-799.) A determination of obscenity may therefore be made by a grand jury, insofar as the issue of probable cause is concerned, without the necessity of receiving evidence as to such standards." (226 Cal.App.2d at p. 531.) We denied a petition for a hearing.

In the nine and a half years since our decision in Aday v. Superior Court and the six and a half years since our denial of a hearing in People v. Aday, we have not overruled, disapproved or in any way qualified the rules as to the determination of probable cause in obscenity cases.[5] The *Aday* cases retain their full vitality as precedents on this question and we conclude, to use our former language, that it is "not neces-

[5]The concept of probable cause is approximately the same whether it is applied to determine the legality of a search warrant, or of an arrest without a warrant, or of a felony accusation. (People v. Stout (1967) 66 Cal. 2d 184, 192-193; People v. Aday, *supra*, 226 Cal.App.2d 520, 532-533.)

sary . . . to . . . receive evidence as to contemporary community standards in order to determine the issue of probable cause." (55 Cal.2d at p. 798.) The failure to introduce evidence of contemporary community standards before the grand jury did not render the instant indictment defective.

Defendants contend, however, that even if an indictment is proper where no evidence of contemporary community standards is presented to the grand jury, the present indictment is invalid because "Sex Life of a Cop" was introduced as an example of obscenity under contemporary community standards. They argue that since the United States Supreme Court later held that "Sex Life of a Cop" was *not* obscene (Aday v. United States, *supra*, 388 U.S. 447), the grand jury in this case was permitted and advised to use an erroneous example of contemporary community standards in determining the obscenity of the challenged book. However, the grand jury did not determine that the challenged books were in fact obscene, but only that there was probable cause to believe them obscene. While the United States Supreme Court subsequently held that "Sex Life of a Cop" is not, in fact, obscene, there is still, as we held in Aday v. Superior Court, *supra*, 55 Cal.2d 789, 798, probable cause to believe the book obscene. "Sex Life of a Cop" might have been an erroneous example of contemporary community standards if the grand jury had heard testimony that the book *was obscene* by those standards. But in this case the grand jury was not misled because the testimony[6]

[6]At the beginning of the grand jury proceedings, the deputy district attorney introduced two copies of the book "Sex Life of a Cop" which had previously been introduced in the criminal action of People v. Haddad. Later on Sergeant McPhee tes-

was only that the two *Aday* cases had held that there *was probable cause* to believe "Sex Life of a Cop" to be obscene. Such testimony was and remains perfectly accurate and proper. Under the circumstances, we cannot see how the reading of the fifth book dealt a fatal blow to the otherwise valid accusation.[7]

Finally, we reach defendants' contention that the decision of the United States Supreme Court in Stanley v. Georgia (1969) 394 U.S. 557 requires a dismissal of the instant indictment. We summarize defendants' long and ingeniously concatenated argument: That *Stanley* held that the private possession of obscene matter cannot constitutionally be made a crime; that by its decision, the high court, "making significant changes in its concept of 'obscenity'," declared obscenity to be speech within the protection of the First Amendment; that no governmental regulation of speech within the First Amendment is valid unless there "is a clear showing that the burden placed upon exercise of freedom of speech is justified by a compelling state interest" which cannot be protected by means less burdensome to the exercise of First Amendment rights; that in *Stanley*, the court found only two compelling state interests

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tified that in connection with his testimony in the *Haddad* case, he had compared one of the copies with the book "Sex Life of a Cop" involved in the *Aday* case in the Court of Appeal and found it to be the same book; that he had read the opinions of the Supreme Court and of the Court of Appeal in the *Aday* cases and noted that the courts in those cases held that there was probable cause for believing "Sex Life of a Cop" to be obscene.

[7]Defendants initially raised several additional challenges to the validity of the instant indictment before the trial court. Because of that court's conclusions on the issues discussed above, it did not address itself to these supplemental points. Inasmuch as these contentions have been neither briefed nor argued before this court, we believe it would be inappropriate for us to pass on them at this time. On remand, the trial court will be able to address these arguments in the first instance.

which require regulation of obscenity—the state concern for minors and the state interest in preventing intrusions upon the sensibilities or privacy of an unwilling audience; that since under the holding in *Stanley* a person has a constitutional right to *possess* obscene material, it follows that any governmental limitation upon the *sale* or *distribution* of such material also contravenes First Amendment rights; and that accordingly, individuals "have the right to publish, prepare, print and sell such material without governmental intervention, except in cases where the material is intended for minors or is distributed in such a manner as to intrude upon the sensibilities or privacy of the general public unwilling to be exposed to such material:"

Applying this interpretation to the case at bench, defendants urge that (a) since the indictment does not charge defendants with, and (b) the grand jury transcript is barren of any evidence establishing probable cause to believe that defendants participated in, distributing obscene material to minors or to unwilling persons in such a manner as to intrude upon their privacy or sensibilities,[8] the indictment must be set aside.

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[8]We note that several lower federal court decisions appear to support defendants' contention. (Karalexis v. Byrne (D. Mass. 1969) 306 F.Supp. 1363, probable jurisdiction noted (1970) 397 U.S. 985; restored to calendar for reargument (1970) 399 U.S. 922; United States v. Thirty-Seven Photographs (C.D. Cal. 1970) 309 F.Supp. 36, probable jurisdiction noted (1970) ..... U.S. ....., 91 S.Ct. 34; United States v. Lethe. (E.D. Cal. 1970) 312 F.Supp. 421; United States v. Reidel (C.D. Cal. 1970) unreported case, probable jurisdiction noted (1970) .... U.S. ....., 91 S.Ct. 67; Hayse v. Van Hoomissen (D.Ore. 1970) ....., F.Supp. .....; United States v. Dellapia (2d Cir. 1970) 433 F.2d 1252.) These decisions, of course, are not compelling authority for us (In re Whitehorn (1969) 1 Cal.3d 504, 511, fn. 2) and for the reasons stated hereafter, we disagree with any language in those cases which indicates that *Stanley* has impaired Roth v. United States, *supra,* 354 U.S. 476.

We believe that defendant's analysis of the *Stanley* rationale is incorrect, and that their contention based upon such analysis is without merit. In *Stanley*, officers investigating the defendant's bookmaking activities, obtained a search warrant for his home and entered pursuant thereto. They found little evidence of bookmaking but while looking through a desk in an upstair's bedroom found and seized reels of obscene films. The defendant was charged with and convicted of "knowingly having possession of . . . obscene matter" in violation of a Georgia statute. The Supreme Court of Georgia affirmed but the Supreme Court of the United States reversed holding that "the mere private possession of obscene matter cannot constitutionally be made a crime." (394 U.S. at p. 559). Such a state statute, the court held, constituted a drastic invasion of a person's right to receive information and his fundamental right to be free from "unwanted governmental intrusions into one's privacy." (394 U.S. at p. 564.) It found no valid state interest[9] in prohibiting the private possession of obscenity and therefore held the statute unconstitutional as an unwarranted intrusion on First Amendment rights.

At each step in its reasoning, however, the high court in *Stanley* was careful to distinguish the problem of *commercial distribution* of obscenity, involved in Roth v. United States, *supra*, 354 U.S. 476 and in the instant case, from the problem of *private possession* of obscene material, involved in *Stanley*. The court recognized that *Roth* and the cases which followed it

[9]The court rejected as insufficient the asserted state interests in protecting the reader's or viewer's mind from the harmful effects which obscenity might have, and in protecting against the aberrant sexual behavior which it is claimed results from private possession and use of obscene matter.

had found state interests in dealing with the problem of obscenity sufficient to justify regulation of commercial distribution of obscene matter. The court concluded that no such state interest justified the state regulation of private possession of obscenity, but it distinguished *Roth* because "that case dealt with public distribution of obscene materials and such distribution is subject to different objections." (394 U.S. at p. 567.)

As *Stanley* recognized, a court, in deciding the constitutionality of a state regulation of obscenity must balance the state interests advanced by such regulation against the constitutional rights affected by it. No legitimate state interest justified the drastic invasion of constitutional rights incident to regulation of private possession of obscenity; therefore, such regulation is unconstitutional. But the Supreme Court noted that public distribution of obscenity presents different dangers and is subject to different objections which support state regulation of such distribution. The essence of the court's reasoning is found in the following language of the opinion: "Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." (Stanley v. Georgia, *supra*, 394 U.S. at p. 565.) "Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." (*Id.* at p. 566.)

Finally, as if to leave no doubt as to the extent of its holding, the high court concluded: "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. [Fn. omitted.] *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." (394 U.S. at p. 568.)

We also find meritless defendants' argument that the holding in *Stanley* necessitates the conclusion that a state may not constitutionally regulate commercial distribution of obscene material because such regulation makes more difficult the full exercise of the right to possess obscenity privately. The rights protected by the First and Fourteenth Amendments are not "absolutes" in the sense that where the constitutional protection exists it must prevail. (Konigsberg v. State Bar (1960) 366 U.S. 36, 49; Breard v. City of Alexandria (1951) 341 U.S. 622, 642.) As we said in *Breard:* "Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life." (*Id.*) As we have discussed above, in the context of public distribution of obscenity, the balance of interests upholds the constitutionality of state regulation, even though that regulation imposes some burdens upon the exercise of constitutional rights.

Therefore, we find that *Stanley,* as the United States Supreme Court expressly stated, does not impair *Roth* and the cases following it. States retain broad power to

regulate obscenity and regulation of the public distribution of obscenity falls well within the broad scope of that power. *Stanley* does not require that an indictment charging public distribution of obscenity also charge that the obscene matter was distributed to a child or unwilling audiences. We conclude that *Stanley* has no application to the instant case.

The order setting aside the indictment is reversed.

Sullivan, *J.*

We Concur:

Wright, *C. J.*
McComb, *J.*
Burke, *J.*

DISSENTING OPINION BY TOBRINER, J.

I dissent. In my opinion the broad constitutional rationale underlying the United States Supreme Court's recent obscenity decision of Stanley v. Georgia (1969) 394 U.S. 557, significantly alters prior obscenity doctrine and dictates that the dismissal of the present indictment be affirmed. I therefore find it unnecessary to reach the issue of whether affirmative evidence of contemporary community standards must be presented at grand jury proceedings.

It is no novel revelation that the passage of years since the United States Supreme Court first attempted a constitutional definition of obscenity in Roth v. United States (1957) 354 U.S. 476, has not produced a coalescence of judicial opinion but instead a multiplicity of standards.[1] Throughout this period, courts have struggled to find an accommodation between the constitutionality protected interest in free speech and the legitimate public interest in controlling activities which fall under the broad category of obscenity. In this process the judiciary, acknowledging that constitutional doctrine is still in the formative stage in this area,[2] has viewed the problem from different angles, seeking to

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[1]Justice Harlan, dissenting in Interstate, Inc. v. City of Dallas (1968) 390 U.S. 676, 705 fn. 1, noted that in 13 obscenity cases decided by the United States Supreme Court since *Roth*, there had been 55 separate opinions among the justices. Moreover, "[a] scholarly article has deduced from the spate of decisions in 1966 no less than 'five separate and contradictory tests.' Magrath, The Obscenity Cases: Grapes of Roth, 1966 Sup. Ct.Rev. 7, 56-57." (United States v. A. Motion Picture Film Entitled "I Am Curious-Yellow" (2d Cir. 1968) 404 F. 2d 196, 200 (Friendly J., concurring).) "When ruling on obscenity, state and federal appellate benches do not split, they splinter." (R. Kuh, Foolish Figleaves? Pornography In—and Out of—Court (1967) p. 215.)

[2]Cf. Jacobellis v. Ohio (1964) 378 U.S. 184, 200 (Warren, C.J., dissenting).

find the position that best illuminates the proper reconciliation of the opposing forces at work here.

The opinion in Stanley v. Georgia, supra, 394 U.S. 557, by centering attention on the protection that is guaranteed the ultimate adult consumer of communicated ideas, reveals constitutional principles that I believe necessarily influence the judicial approach to the state regulation of obscenity at issue in the instant criminal proceeding. In *Stanley*, Justice Marshall, writing for a majority of five justices,[3] declared unconstitutional a state statute which made the possession of obscene material a crime, concluding that the defendant had a First Amendment right to possess and read or view in the privacy of his home all communicative materials "regardless of their social worth." Analysis of the rationale underlying this decision convinces me that our state and federal Constitutions compel a reexamination of the permissible scope of Penal Code section 311.2, regulating the preparation, publication, printing, and distribution of communicative material intended for the private use of adults.

In *Stanley*, the Supreme Court addressed for the first time a case of an adult defendant convicted of a crime because he possessed obscene films in his home. Led by these facts to examine the permissibility of gov-

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[3]There were no dissenters from Justice Marshall's opinion. Three justices (Stewart, J., Brennan, J., and White, J.) did not find it necessary to reach the constitutional questions faced by the majority, concluding that the evidence which formed the basis of the criminal prosecution was obtained through an unconstitutional search and seizure. Justice Black, in a separate concurrence, relied on his unvarying position that the states are completely without authority to proscribe obscenity in any form. The absence of a disagreement with the merits of the majority opinion is itself a significant occurrence in the obscenity area. (See fn. 2, supra.)

ernmental action in regulating the content of an adult's private library of books or films, the court concluded that the First Amendment demanded that the individual be free to choose what books he would read or what films he would view in the privacy of his home without fear of governmental sanction. The court reasoned: "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily protects the right to receive. . . .' Martin v. City of Struthers, 319 U.S. 141, 143 (1943); see Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Lamont v. Postmaster General, 381 U.S. 301, 307-308 (1965) (Brennan, J., concurring); cf. Pierce v. Society of Sisters, 268 U.S. 510 (1925). This right to receive information and ideas, regardless of their social worth, see Winters v. New York, 333 U.S. 507, 510 (1948) is fundamental to our free society. . . . If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." (394 U.S. at pp. 564-565.)

The People have suggested that this court has anticipated the broad holding of *Stanley* by its interpretation of Penal Code section 311.2 in In re Klor (1966) 64 Cal.2d 816, and thus that *Stanley* works no substantial change in California law. In *Klor* we held that the mere preparation of obscene material was not a violation of section 311.2. In reaching that conclusion we reasoned in part: "Without the requirement that the defendant be shown to have prepared the material with intent to distribute it in its obscene

form, [section 311.2] would apply to matter produced solely for the personal enjoyment of the creator or as a means for the improvement of his artistic techniques. Such a statute would approach an interdiction of individual expression in violation of the First and Fourteenth Amendments." (Fn. omitted.) (64 Cal.2d at p. 820.)

Our emphasis in *Klor,* however, was not on the individual's right to receive all written ideas in the privacy of his home, but rather on an individual's right to express ideas. Thus we concluded in *Klor:* "In summary, we do not believe that the Legislature intended to inhibit the mere preparation of allegedly obscene material not intended for distribution. We cannot believe that the Legislature meant to freeze the creative process and cast the maker's unfinished product into forbidden form during its genesis. Thus to stifle individual expression would be to shackle creativity itself." (64 Cal. 2d at p. 822.) (See also People v. Noroff (1967) 67 Cal.2d 791, 793 fn. 4.)

Stanley, in examining the right of an adult to possess all material, whether or not obscene, focusses on the individual as recipient of ideas, not creator. Nowhere in *Stanley* is there the slightest indication that the court saw its decision limited to material created by the possessor; indeed, the thrust of the whole opinion precludes such a construction. As the *Stanley* court viewed the interests before it, the defendant was "asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional need in the privacy of his own home. *He is asserting the right to be free from state inquiry into the contents of his library.*" (Italics added.) (394 U.S. at p. 565.) It is these rights which

Stanley determines are guaranteed to the individual by the Constitution; our decision in *Klor* was not so directed.

As the *Stanley* court emphasized, the question of the government's effective control of a man's own library involves the added dimension of an intrusion into the individual's private domain. In our highly complex and increasingly interdependent society the need to preserve the individual's freedom of thought has become crucial. The individual has been confronted with the rise of tremendous power in government and in the so-called technostructure that tends to compel conformity and standardization. The central issue of our times must be to preserve the identity of the individual in the face of a dangerous depersonalization and dehumanization. The censorship of the citizen's reading matter and the destruction of his access to reading matter, even though that censorship takes the form of prohibiting "pornography," inevitably spills over into censorship of political reading matter.[4] These are the compelling reasons why, in today's society, the individual's choice of the books he desires to read in private should be inviolate.

Stanley demonstrates that our constitutional protections secure to all persons this right of individual choice. So long as he does not invade the rights of others, the adult should be free not only to say whatever he wants and to advocate whatever he believes, but also to choose what books he will read or what films he will watch in his home. (See Zeitlin v. Arnebergh (1963) 59 Cal.2d 901, 902.) *Stanley* thus insures the

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[4]Cf. Barrows v. Municipal Court (1970) 1 Cal. 3d 821, 824 & fn. 4; fn. 7, infra.

preservation of a private domain where the individual is the complete master of what he reads and what he thinks. (See Olmstead v. United States (1928) 277 U.S. 438, 478 (Brandeis, J., dissenting); cf. Rowan v. United States Post Office Dept. (1970) 397 U.S. 728, 736-738; Griswold v. Connecticut (1965) 381 U.S. 479; People v. Belous (1969) 71 Cal.2d 954, 963-964; City of Carmel-by-the-Sea v. Young (1970) 2 Cal. 3d 259, 268; In re Lifschutz (1970) 2 Cal.3d 415, 431-432.)

Although the *Stanley* court purported to work no fundamental changes in the constitutional rationale that underlay the general treatment of obscenity in *Roth* and the post-*Roth* obscenity cases, the basis of the *Stanley* opinion, as I understand it, necessarily modifies *Roth's* broad declaration that obscenity is not protected by the First Amendment.[5] Elaboration of the

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[5]In the past year and a half numerous federal courts have reached precisely the same conclusion in interpreting the *Stanley* decision. (United States v. Dellapia (2d Cir. 1970) 433 F.2d 1252, 1255 ("Where does *Stanley* locate the boundary between the government's right to control obscene matter deemed inimical to public order or the public morality and the right of individuals to keep to themselves? Is there a fundamental privilege to exchange and enjoy in private, letters, stories, books, movies—or spoken words—however sordid? After *Stanley* we do not see that we can answer these questions other than by a case by case accommodation of legitimate, competing interests."); Hayes v. Van Hoomissen (D. Ore. 1970 ..... F.Supp. ....., ... [8 Crim. L.Rptr. 2219, 2220] ("It is no longer accurate to state categorically that the First Amendment does not protect obscenity. It is now necessary to inquire beyond the mere nature of the published matter, and to look into the government's interest in suppressing it."); United States v. Various Articles of "Obscene" Merchandise (S.D. N.Y. 1970) 315 F.Supp. 191, 195 (3 judge court) ("The clear implication [of *Stanley*] is that orthodox First Amendment considerations are once again of paramount importance, *Roth* notwithstanding, even where the publications in issue are concededly 'obscene.' "); United States v. Reidel (C.D. Cal. 1970) (unreported decision) probate ju-

constitutional position of *Roth* in subsequent Supreme Court decisions reveals that at least several justices of the court felt that the prohibition of all obscene speech was reconciliable with the First Amendment because, by constitutional definition, matter was obscene only if it was "*utterly* without redeeming social importance."[6] Thus, before *Stanley*, the interest protected by the First

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risdiction noted (1970) 91 S.Ct. 67 (docket No. 534); United States v. Lethe (E.D.Cal. 1970) 312 F.Supp. 421, 423-426; United States v. Thirty Seven Photographs (C.D.Cal. 1970) 309 F.Supp. 36 (three-judge court); probable jurisdiction noted (1970) 91 S.Ct. 34 (docket No. 133); Karalexis v. Byrne (D. Mass. 1969) 306 F.Supp. 1363, 1366 (three-judge court, Aldrich, J.), probable jurisdiction noted, Byrne v. Karalexis (1970) 399 U.S. 985, calendared for re-argument (1970) 399 U.S. 922 (docket No. 83) ("Roth cannot remain intact, for the Court there had announced that 'obscenity is not within the area of constitutionality protected speech or press' . . . whereas [the *Stanley* court] held that Stanley's interest was protected by the First Amendment, and that the fact that the film was 'devoid of any ideological content' was irrelevant"); Stein v. Batchelor (N.D. Tex. 1969) 300 F.Supp. 602, 606, probable jurisdiction noted, Dyson v. Stein (1969) 396 U.S. 954, calendared for reargument (1970) 399 U.S. 922 (docket No. 41) ("It is impossible . . . for this Court to ignore the broader implications of the opinion which appears [*sic*] to reject or significantly modify the proposition stated in Roth . . . that 'obscenity is not within the area of constitutionally protected speech or press.' ").)

In addition, although legal writers are notorious for their general inability to agree, the host of legal commentators on the *Stanley* decision almost unanimously concur in this interpretation. (See Katz, *Privacy and Pornography*, 1969 Sup.Ct. Rev. 203; Engdahl, *Requim for Roth: Obscenity Doctrine is Changing* (1969) 68 Mich.L.Rev. 185, 198-201; Note, *The Supreme Court*, 1968 *Term* (1969) 83 Harv.L.Rev. 7, 147-154; Note *The New Metaphysics of the Law of Obscenity* (1969) 57 Cal. L.Rev. 1257; Note, *Stanley v. Georgia—A Private Look at Obscenity* (1969) 21 Baylor L.Rev. 503; 22 U.Fla.L.Rev. 138, 144; 7 San Diego L.Rev. 111, 118-119; cf. Gegan, *Twilight of Nonspeech* (1969) 15 Cath. Law. 210, 219.)

[6]A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413, 419 (Brennan, J., joined by Warren, C.J., and Fortas, J.); Jacobellis v. Ohio (1964) 378 U.S. 184, 191 (Brennan, J., joined by Goldberg, J.).

Amendment seemed to be only the preservation of material having at least a modicum of social importance.

In *Stanley*, however, the court stated unequivocally that individuals enjoy a constitutional "right to receive information and ideas, *regardless of their social worth.*" (Italics added.) (394 U.S. at p. 564.) The *Stanley* court further elaborated its rejection of the limitation of First Amendment rights to matters having some "redeeming social importance": "Nor is it relevant that obscenity in general, or the particular films before the Court, are arguably devoid of any ideological content. *The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all.* See Winters v. New York, supra, 333 U.S. at 510." (Italics added.) (394 U.S. at p. 566.)[7]

Although *Stanley* thus dictates that the government "has no business" in regulating the content of an adult's reading matter, the opinion expressly declares that the states retain the power to regulate the public dissemination of obscene material. (394 U.S. at pp. 563, 568.)

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[7]The Supreme Court's candid recognition of the "too elusive" quality of the line separating allegedly "contentless" obscenity from "socially valuable" communication is particularly appropriate at this time when a "cultural revolution" in our society has illustrated the potential role of profane or "obscene" language as political expression. (See Henley v. Wise (N.D.Ind. 1969) 303 F.Supp. 62, 70.) In challenging the values and prevailing morality of American society, dissenters have often consciously cast off traditional linguistic shibboleths, not intending to appeal to anyone's "prurient interest," but rather attempting to shock their audience into reexamining and reevaluating commonly held norms. Although many may find the proposed reordering of morality personally offensive, and others may find the strategy utilized unwise or even counter-productive, the preservation of the right of free expression of all "political" views lies, of course, at the heart of the First Amendment. (See Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment,"* 1964 Sup.Ct.Rev. 191, 221.)

The People contend that this declaration demonstrates that Penal Code section 311.2 accords with *Stanley* since the section proscribes only the distribution of obscene material and the printing, preparation, and publication of obscene material with the intent to distribute it.

The "power to regulate," however, does not encompass the authority to prohibit all means of distribution of material that is intended for the private use of adults. The rights of adults to possess, study, and enjoy all ideas in the privacy of their homes would mean little if the state could effectively foreclose all legal means of access to a designated category of material by penalizing anyone who distributed it. We should not be so disingenuous as to recognize, as we must, that our state and federal Constitutions protect an adult's right to possess all written material regardless of content, and simultaneously to acknowledge authority in the government to prohibit the dissemination of such material intended for private adult use solely because of that material's conduct.

The courts have long held that the right to disseminate material protected by the First Amendment is an integral and necessary part of that constitutional right. (Martin v. City of Struthers (1943) 319 U.S. 141, 143 ("This freedom [of speech and press] embraces the *right to distribute literature,* Lovell v. Griffin, 303 U.S. 444, 452, and necessarily protects the right to receive it."); Griswold v. Connecticut (1965) 381 U.S. 479, 482 ("the right of freedom of speech and press includes *not only the right to utter or to print, but the right to distribute,* the right to receive, the right to read") (italics added).) Moreover, "when expression protected by the First Amendment is involved 'It is of

course no matter that the dissemination takes place under commercial auspices." (Weaver v. Jordan (1966) 64 Cal.2d 235, 246; see New York Times v. Sullivan (1964) 376 U.S. 254, 265-266; Smith v. California (1959) 362 U.S. 147, 150.)[8] The marketplace of ideas will surely be barren if all sellers are excluded. (Cf. Lamont v. Postmaster General (1965) 381 U.S. 301, 308 (Brennan, J., concurring).)

The constitutional interests involved in this criminal proceeding are thus broader than that of the defendant printer, publisher, or distributor (cf. Interstate Circuit v. Dallas (1968) 390 U.S. 676, 684); they are the interests of every adult in realistically being able to exercise his constitutional right to decide which books he will read in the privacy of his home. *Stanley* commands that the individual, not the government, be the one who ultimately decides whether the individual will read a book or not; the state as effectively withdraws that individual choice by the criminal prosecution of all who print, publish, or disseminate an "obscene" work as by the criminal prosecution of the reader himself. In either case the state eliminates from normal circulation those publications which are the subject of its censure. The alternative interpretation of *Stanley*, giving the state full authority to proscribe any dissemination of obscene matter, would effectively mean that the First Amendment protections apply only to

[8]See also Ginzburg v. United States (1966) 383 U.S. 463, 474 (Brennan, J.): "No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed . . . cannot themselves be judged obscene in the abstract; to sanction consideration of this fact might induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is not justification for narrowing the protection of expression secured by the First Amendment." (Fn. omitted.)

an author's possession of his own works. I can find no indication in the Supreme Court decision that the First Amendment rights are to be so eviscerated.

Indeed, *Stanley* explicitly rejected as incompatible with the First Amendment the two main governmental purposes that have been proffered to support a general governmental prohibition of all distribution of such materials: (1) the governmental interest in protecting the morality of adults by controlling what reading materials they may legally obtain and (2) the governmental interest in curtailing potential criminal activity allegedly fostered by the reading of obscene matter.

The propriety of grounding governmental regulation of written and filmed expression on an asserted state interest in maintaining a certain standard of morality, an issue which created a great philosophical debate in the nineteenth century,[9] has recently become the subject of a dialogue between some of the leading legal theoreticians of our age.[10] In *Stanley*, the United States Supreme Court forthrightly declared that the state's exercise of control over morality by prescribing what materials can be read or observed by adults was incompatible with the First Amendment. ". . . Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the

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[9]See Mill, On Liberty (1859); Stephen, Liberty, Equality, Fraternity (1873).

[10]*Compare*, e.g., Hart, Law, Liberty, and Morality (1963) *with* Devlin, The Enforcement of Morals (1959), and Devlin, *Law, Democracy and Morality* (1962) 110 U.Pa.L.Rev. 635.

philosophy of the First Amendment. As the Court said in Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 688-689 (1959), '[t]his argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. . . .'" (Fn. omitted.) (394 U.S. at pp. 565-566.)[11] I cannot preceive how such a purpose of "control[ling] the moral content of a person's thoughts" is any more compatible with the First Amendment when used to justify the prohibition of distributing material intended for private use by adults than when used to justify the prohibition of reading or viewing such material.

The court similarly rejected the argument that would justify complete prohibition of dissemination on the grounds that exposure to such material might lead the adult recipients to antisocial conduct. While the court in *Roth* had not felt constrained to embrace this issue directly (see 354 U.S. at pp. 486-487), the *Stanley* court did: ". . . Georgia asserts that exposure to obscenity may lead to deviant sexual behavior or crimes

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[11]In this regard Professor Herbert L. Packer has written: "The only valid purpose of obscenity law is to prevent public offense. It should be viewed, purely and simply, as the proscription of nuisance. People who do not wish to have erotic or other material that they find offensive foisted upon them are entitled to protection from it. . . . But it is hardly necessary in protecting that interest to forbid willing buyers and sellers to seek each other out. No one is forced to read *Fanny Hill*, or see a screening of *Un Chant 'Amour*, or attend a performance of *The Beard*. If to do so violates some moral or religious tenet that he holds important, he may keep the faith without requiring others, who do not share it, to follow suit." (Packer, The Limits of the Criminal Sanction (1968) p. 324.)

See also Henkin, *Morals and the Constitution; The Sin of Obscenity* (1963) 63 Cal.L.Rev. 391; Skolnick, *Coercion to Virtue: Enforcement of Morals* (1968) 41 So.Cal.L.Rev. 588.

of sexual violence. There appears to be little empirical basis for that assertion. But more important, if the State is only concerned about literature inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law. . . .' Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring). See Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 938 (1963). Given the present state of knowledge, the State may no more prohibit mere possession of obscenity on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." (Fn. omitted.) (394 U.S. at pp. 566-567.)

Although the constitutional right of adults to possess material, whatever its worth, thus necessarily means that government may not completely prohibit the dissemination of material intended for an adult's private use, *Stanley* makes it perfectly clear that the state retains authority to regulate the manner of public dissemination[12] in furtherance of two legitimate governmental objectives. The Supreme Court, drawing from its experience garnered in previous obscenity cases, isolated two state objectives that are permissible bases for the regulation of public distribution of obscene material: (1) the protection of an unwilling individual from blatant and offensive assaults on his sensibilities

[12]Cf. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment* (1965) 79 Harv.L.Rev. 1, 5.

and (2) the protection of children. (394 U.S. at p. 567.)[18]

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[18]The identification of these two purposes as legitimate forms of state regulation has emerged gradually in the opinions of many of the Supreme Court justices over the past 12 years. Perhaps Chief Justice Warren, concurring in Roth v. United States (1957) 354 U.S. 476, 495, laid the foundation for the approach to obscenity problems embraced in *Stanley* when he wrote: "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. . . . A wholly different result might be reached in a different setting." (P. 495.)

The initial articulation of the legitimate state interest in protecting the sensibilities of the public from offensve assaults also appeared in *Roth*. Justice Harlan, in his concurring and dissenting opinion, proposed that: "the State has a legitimate interest in protecting the privacy of the home against invasions of *unsolicited* obscenity." (Italics added.) (354 U.S. at p. 502.) This concern with interferences with the privacy of the public is apparent throughout the entire opinion of Justice Brennan, joined by Chief Justice Warren and Justices Clark, White, and Fortas, in Ginzburg v. United States (1966) 383 U.S. 463, 469-470. In concluding that the defendant's "pandering" could properly be taken into account in an obscenity case, the court expressed concern with the "brazen" public dissemination of offensive material (383 U.S. at p. 470), the "indiscriminate . . . solicitation" (*id.* at p. 469), and the "flooded mails" (*id.* at p. 473). As the court explicitly noted, "[P]ublic confrontation with the potentially offensive aspects of the work . . . heightens the offensiveness of the publications to those who are offended by such material." (*Id.* at p. 470.) (See Note, *More Ado About Dirty Books* (1966) 75 Yale L.J. 1364, 1404 fn. 156.)

Justice Stewart explained the legal rationale for such concern more fully two years later, in his concurring opinion in Ginzberg v. New York (1968) 390 U.S. 629, 649: "When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees. So it was that this Court sustained a city ordinance prohibiting people from imposing their opinions on others 'by way of sound trucks with loud and raucous noises on city streets.' [Kovacs v. Cooper, 336 U.S. 77, 86.] And so it was that my Brothers Black and Douglas thought that the First Amendment itself protects a person from foisting his uninvited views upon the members of a captive audience.' [Public Utilities Comm. v. Pollack, 343 U.S. 451, 466 (Black, J., dissenting), 467 (Douglas, J., dissenting)]."

The court's very recent unanimous decision in Rowan v. United States Post Office Dept. (1970) 397 U.S. 728, upholding a fed-

The People contend that since any public dissemination of obscene material presents the danger that pub-

eral statute permitting a householder to insulate himself from mailed advertisements he finds "erotically arousing or sexually provocative," represents the full crystallization of this concern for protection from unsolicited and undesired "psychic" affronts.

The state interest in protecting its children from obscenity has similarly emerged in a number of obscenity decisions. In Jacobellis v. Ohio (1964) 378 U.S. 184, Justice Brennan, joined in concurrence by Justice Goldberg, stated forthrightly: "We recognize the legitimate and indeed exigent interest of states and localities throughout the nation in preventing the dissemination of material deemed harmful to children . . . . State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination." (Fn. omitted.) In a separate opinion in *Jacobellis* Chief Justice Warren suggested: "A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time, 'obscene' in the extreme when sold or displayed to children." (Fn. omitted.) (378 U.S. at p. 201.)

In Ginsberg v. New York (1968) 390 U.S. 629, Justice Brennan, writing for six members of the court, upheld the constitutionality of a special statute directed at the sale of "obscene" material to minors. The court concluded that it was constitutionally permissible for a state to prohibit the dissemination of certain material to minors, even though a general prohibition on such dissemination would have violated the First Amendment. Justice Stewart, in his concurrence quoted in part above, found state regulation of obscenity for the protection of children analogous to the permissible regulation to prevent offensive "psychic" assaults on a captive public. Viewing the still maturing minor as not fully capable of exercising a non-coerced, informed, individual choice, Justice Stewart reasoned that in both situations the government was acting to preserve the promise of free choice implicit in the First Amendment. (390 U.S. at p. 649.)

In Redrup v. New York (1967) 386 U.S. 767, 769, before listing the various standards of obscenity espoused by the individual justices, the court expressly noted: "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Massachusetts, 321 U.S. 158; cf. Butler v. State of Michigan, 352 U.S. 380. In none was there any suggestion of an assault upon individual privacy in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard v. City of Alexandria, 341 U.S. 622. . . . And in none was

(This footnote is continued on the next page)

lic sensibilities may be assaulted or that children may obtain the books, the state is justified, in furtherance of these objectives, in proscribing *all* public distribution. This court, however, has long recognized that when the state regulates in the area of First Amendment rights "[p]recision of regulation is required so that the exercise of our most precious freedoms will not be unduly curtailed except to the extent necessitated by the legitimate governmental objective." (Vogel v. County of Los Angeles (1967) 68 Cal.2d 18, 22.) As the United States Supreme Court has explained, "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (Fn. omitted.) (Shelton v. Tucker (1960) 364 U.S. 479, 488.) Indeed, the reasoning underlying the People's contention was rejected long ago by the United States Supreme Court in Butler v. Michigan (1957) 352 U.S.

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there evidence of the sort of pandering which the court found significant in Ginzburg v. United States, 383 U.S. 463."

Prior to *Stanley*, two federal cases interpreted this paragraph in *Redrup* as limiting the obscenity inquiry to interference with the various interests expressly designated. The courts dismissed the cases before them because there was no evidence that any of the "special circumstances" designated in *Redrup* were present. (United States v. 127,295 Copies of Magazine (D.Md. 1968) 295 F.Supp. 1186 (two-judge court); United States v. 4400 Copies of Magazine (D.Md. 1967) 276 F.Supp. 902 (en banc).) (See also Grant v. United States (9th Cir. 1967) 380 F.2d 748, 749 fn.*)

As I understand it, the state interest in preventing "pandering" is substantially equivalent to its interest in prohibiting other offensive public displays or exhibitions which are foisted on unwilling individuals. Insofar as the "pandering" concept represents an independent element relevant to a decision of whether material is obscene or not, the approach in *Stanley* obviates the importance of the concept in cases involving material intended for the private use of adults. Thus, the *Stanley* court significantly noted only two general state interests and did not mention "pandering" at all.

380, in which case the court overturned a state obscenity statute that prohibited the dissemination of First Amendment protected material that the state felt was unfit for its children. In *Butler*, Justice Frankfurter, writing for a unanimous court, declared: "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely this is to burn the house to roast the pig. . . . We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." (352 U.S. at p. 383.)

Although California's criminal statute differs from the Michigan law in that its obscenity standard is ostensibly geared to adults, not children, *Stanley* holds that, as far as government regulation is concerned, no book is "too rugged for grown men and women" to read in the privacy of their home. *Butler* teaches that a general proscription of reading matter cannot be countenanced by the state's concededly legitimate interest in protecting children. Thus California's contention here that all dissemination can be curtailed should be rejected. Similarly, I can perceive no reason why the state's interest in protecting the privacy and sensibilities of the public could justify a general proscription of *all* manner of distribution, including that which does not offend. The evils of the corruption of children and of obnoxious and offensive displays should be met directly and precisely.

Thus, as I read *Stanley*, the governmental authority to regulate the public distribution of reading material

intended for the private use of adults extends only to measures reasonably related to the protection of juveniles or to the protection of the privacy of individuals from unsolicited assaults on their sensibilities.[14] These limits do not leave the state without means to combat the very real evils that may arise as to these matters, but instead require the state to focus upon them and to provide criminal sanctions directed to such evils. The prohibition of intolerably obnoxious advertising campaigns that reach individuals unsolicited certainly falls within such permissible goals of state laws. (See Rowan v. United States Post Office Dept. (1970) 397 U.S. 728, 736-738; cf. Ginzburg v. United States (1966) 383 U.S. 463; United States v. Klaw (2d Cir. 1965) 350 F.2d 155, 163-164.) Further, the state may proscribe the display of patently offensive posters, billboards, and book covers[15] in public areas where in-

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[14]In this regard, the general conclusions reached recently by the Presidential Commission on Obscenity and Pornography are particularly pertinent. The Commission concluded: "In general outline, the Commission recommends that federal, state, and local legislation should not seek to interfere with the right of adults who wish to do so to read, obtain, or view explicit sexual materials. On the other hand, we recommend legislative regulations upon the sale of sexual materials to young persons who do not have the consent of their parents, and we also recommend legislation to protect persons from having sexual materials thrust upon them without their consent through the mails or through open public display." (The Report of the Commission on Obscenity and Pornography, p. 57 (Bantam Edition, 1970).) See also, Krislov, *From Ginzburg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation,* 1968 Sup.Ct.Rev. 153, 193-194; Emerson, *Toward a General Theory of the First Amendment* (1963) 72 Yale L.J. 877, 938-939; Packer, Limits of the Criminal Sanction, pp. 324-325.

[15]The fact that a book uses the word "pornography" or "obscene" on the cover should not, in itself, be enough to make the cover offensive, for such a label in effect gives warning that may prevent an undesired psychic assault. The use of pictorial aids to illustrate the contents of such "rugged" books, however, may be such as to offend the average member of the unwilling

dividuals, unwilling to be confronted with such material, cannot avoid them. (Cf. People v. Stover (1963) 12 N.Y.2d 462 [191 N.E.2d 272] (Fuld, J.).) Similarly, the state may enact legislation that seeks to protect juveniles by prohibiting the sale of certain harmful matter to them (see Ginsberg v. New York (1968) 390 U.S. 629); indeed, the California Legislature has recently approved such a statute (Pen. Code, § 313).[16]

Given the above constitutional considerations, I believe that the indictments in the instant case, charging defendants with conspiring to violate Penal Code section 311.2 by preparing, publishing, printing, and distributing obscene books, material intended for the private use of adults, is constitutionally infirm. Although section 311.2 also prescribes criminal sanctions for individuals who "exhibit" obscene matter, sanctions which under proper circumstances would be compatible with one of the legitimate governmental objectives set out above, the present indictment includes no reference to any exhibition of such materials by the defendants. Nor was any evidence presented to the grand jury which returned the indictment that would warrant such a charge. Under these circumstances, I conclude that the indictment should be dismissed. (See, e.g., Greenberg v. Superior Court (1942) 19 Cal. 2d 319, 322.)

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public, and such illustration could be proscribed (see City of Youngstown v. De Loreto (1969) 19 Ohio App. 267 [251 N.E. 2d 491, 504-505]; only the display of the offensive book cover, however, would be subject to the proscription. Dissemination which does not display the cover, or distribution of the book within a different, non-offensive cover, would be protected.

[16]Of course, I intimate no opinion on the constitutionality of the newly enacted statute, but only indicate that the philosophy of such regulation generally does not conflict with the state and federal Constitutions.

This approach to the regulation of obscenity, necessitated by the rationale of *Stanley*, concededly would work a substantial change in the relevant legal aspects of this area. From the standpoint of the administration of the judicial task, however, such a change would surely be welcome. The past efforts of the courts, and especially the United States Supreme Court, have largely centered on attempts to define constitutionally unprotected obscenity; the task has proven to be Herculean and almost unachievable. Judicial fear of the potential erosion of the definition has necessitated that each level of appellate courts independently review the challenged material[17] in terms of this elusive,[18] non-uniform, concededly subjective definition, an undertaking not only personally distasteful for most judges and enormously time-consuming for all, but one which is essentially non-legal, for the determination of "social worth" cannot be reached by resort to precedent or rational principles.

Stanley's illumination of the permissible fields of governmental regulation would serve to extricate the judiciary from the legal quagmire of obscenity. When materials intended for private individual use are in question, law enforcement officials, courts, and private individuals would no longer be faced with the necessity of performing the nearly impossible process of framing an abstract definition.[19] Instead, legislative reg-

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[17]See, e.g., Jacobellis v. Ohio (1964) 378 U.S. 184, 189-190 (opinion of Brennan, J.); Roth v. United States (1957) 354 U.S. 476, 498 (opinion of Harlan, J.).

[18]"In toto, applying the law to specific questioned materials has been a labor as frustratingly impossible as is nailing custard pies to trees." (Kuh, Foolish Figleaves? Pornography In—And Out of—Court (1967) p. 215.)

[19]Ginzburg v. United States (1966) 383 U.S. 463, 480-481 (Black, J., dissenting), "[N]ot even the most learned judge

ulations and judicial interpretations could focus upon the defined harms of offensive psychic assaults and the corruption of children.[20] This approach would enable judges and lawyers to step back from merely subjective responses and return to reasoned analysis.[21]

To be sure, this reevaluation of legitimate state purposes would not obviate all problems in the field of obscenity. Courts would be obligated to continue to scrutinize regulations directed at fulfilling the above stated goals since they border on constitutionally protected areas. (See, e.g., Bantam Books, Inc. v. Sullivan (1963) 372 U.S. 58, 66.) The regulation of material not covered by the rationale of *Stanley* would still necessarily be judged by present constitutional standards of obscenity. Nonetheless, the judicial task would undoubtedly be lightened by the refocussing of a substantial porportion of obscenity litigation.

My conclusion, however, does not emanate merely from a desire to relieve the judiciary of an unpleasant task. It is instead the recognition of one principle of our governmental system, a principle articulated by Justice Brandeis over 40 years ago: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings

much less a layman is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity' as that term is confused by the Court today."

[20]"Under a nuisance approach law enforcement officers would no longer have a roving commission to stamp out the unorthodox and the avant garde. Their job would be solely to keep the more obvious forms of public display under control. It would be the difference between a defensive and an aggressive war." (Packer, The Limits of the Criminal Sanction, p. 325.)

[21]See Note, supra, 75 Yale L.J. 1364, fn. 19 at p. 1404.

and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." (Olmstead v. United States (1928) 277 U.S. 438, 478 (Brandeis, J., dissenting).) The exercise of governmental authority effectively to prevent an adult from obtaining written material to be read in his home is incompatible with the protection of free speech guaranteed by our state and federal Constitutions.

I would affirm the dismissal of the indictment.

Tobriner, *J.*

We Concur:

Peters, *J.*

Mosk, *J.*